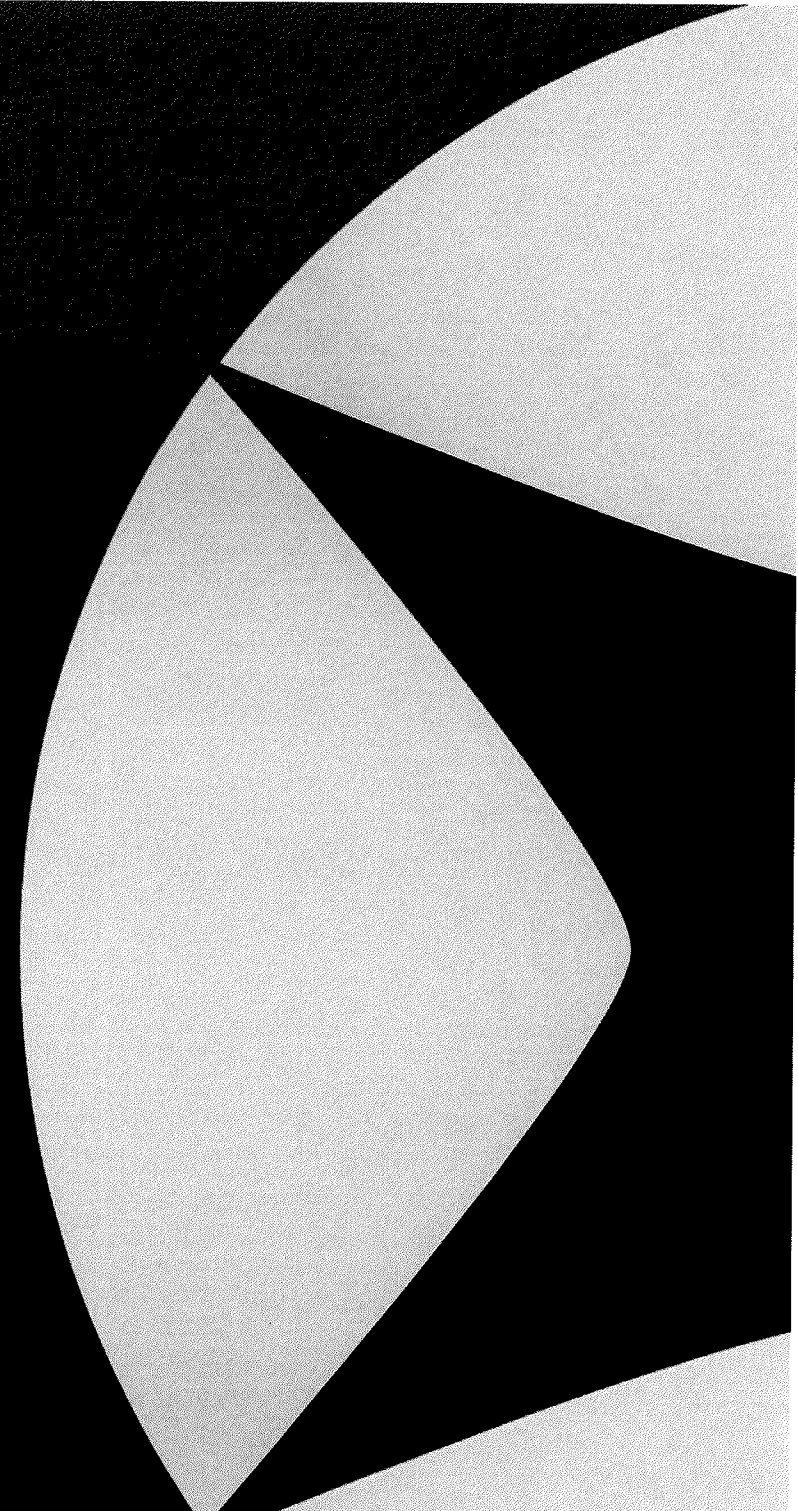


Basic training "Access to Documents"

9 November 2021

Legal Affairs Unit



Introduction



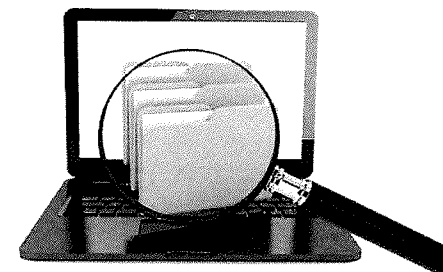
Purposes behind ATD

- ✓ Bring the EU closer to the citizens (particularly in the decision-making) - **Transparency**
- ✓ Make the EU administration more responsible vis-à-vis the citizens – **Accountability - Democracy - Good administration**

Right of access to documents

- For all EU citizens + other persons or entities residing or having a registered office in a MS
- Can be extended to third countries citizens and entities
- No need to justify or explain why access is requested
- No privileged access





Right of access to documents (1/3)

= Any documents held by ECHA

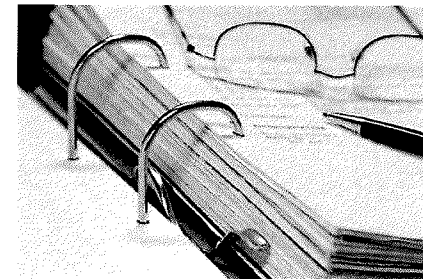
Authors (Member States, companies...)

Format (audio, video...)

Classification (restricted, internal...)

Status (draft, final)

} Not important



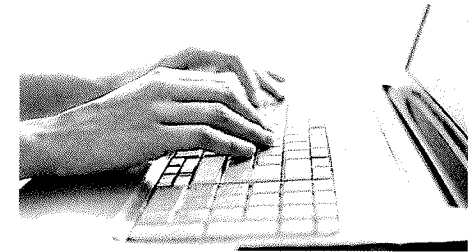
Right of access to documents (2/3)

= Any documents held by ECHA

Existing documents (\neq no duty to create documents, no right to access to information in the wider meaning)



Information easily extractable through preprogrammed search tools from electronic databases = existing document



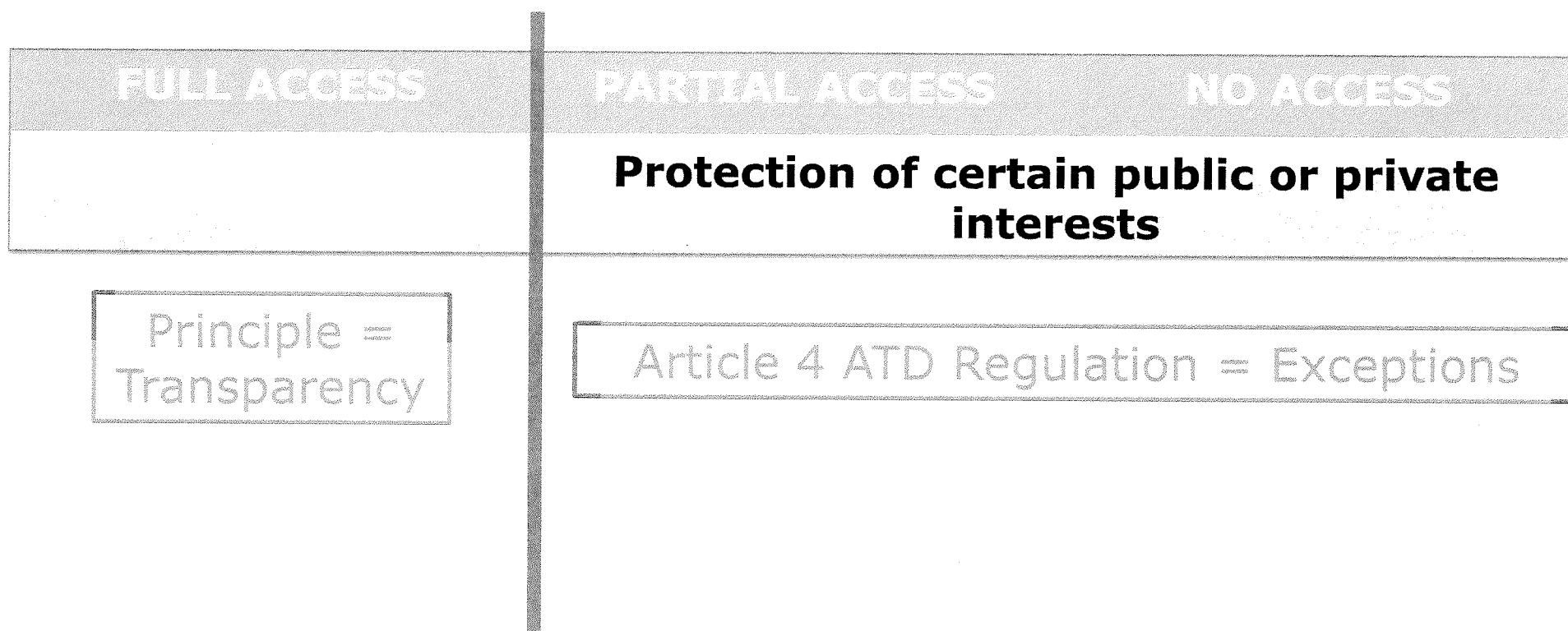
Right of access to documents (3/3)



And if the request concerns emails?

- In the scope if 'record' → PRO 0010
- No 'uncontrolled documents'

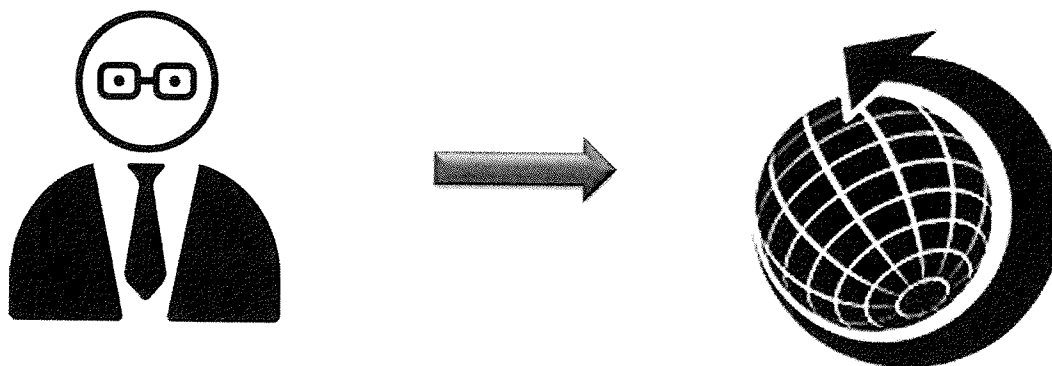
Right of access to documents



Right of access to documents

= *erga omnes* effect of the access

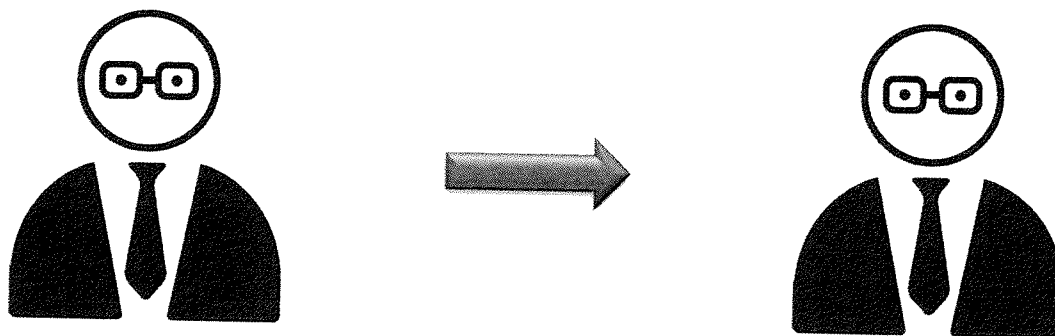
Transmitted to the requester but the documents enter the public domain

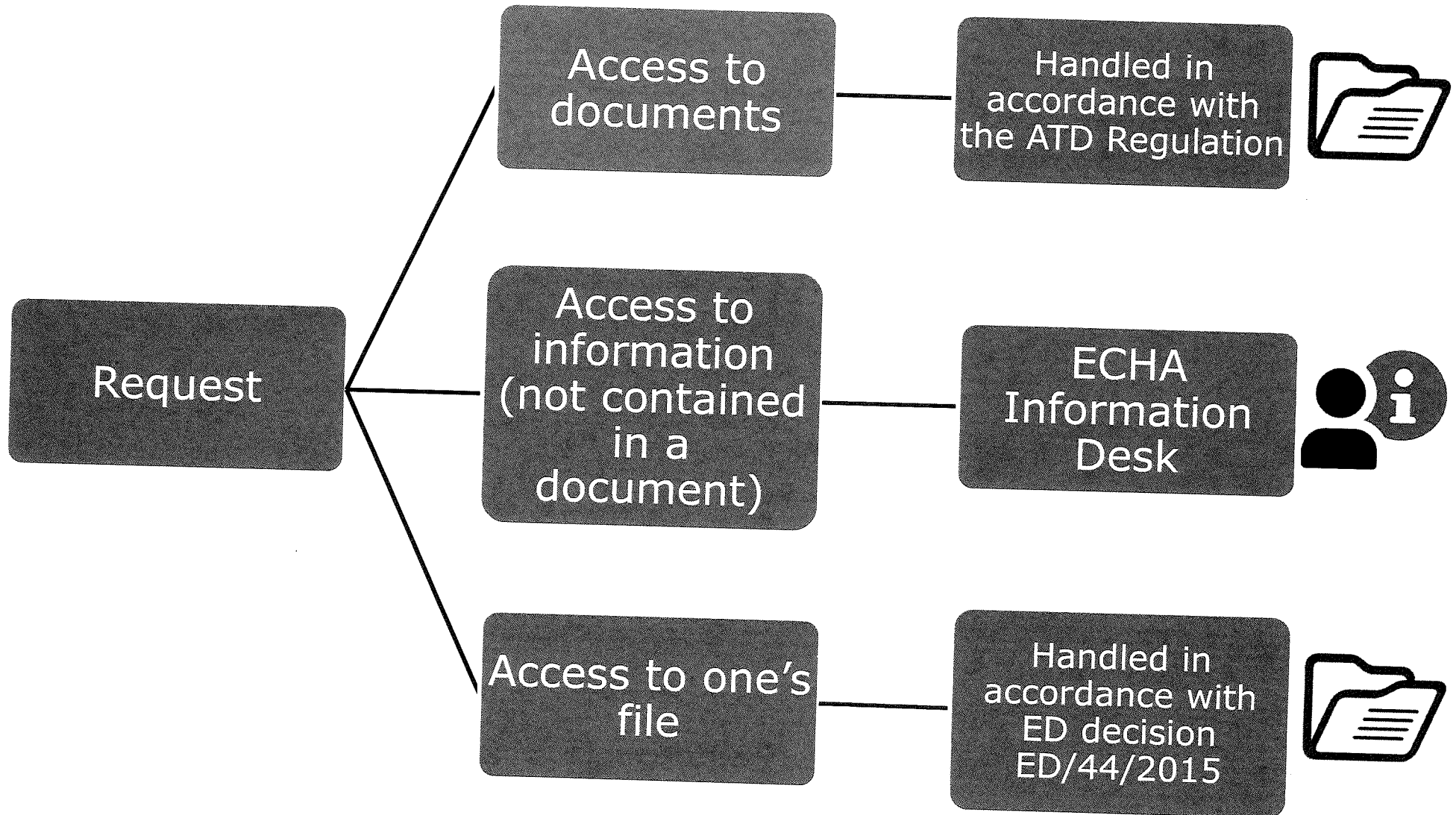


≠ Right of access to 'own file'

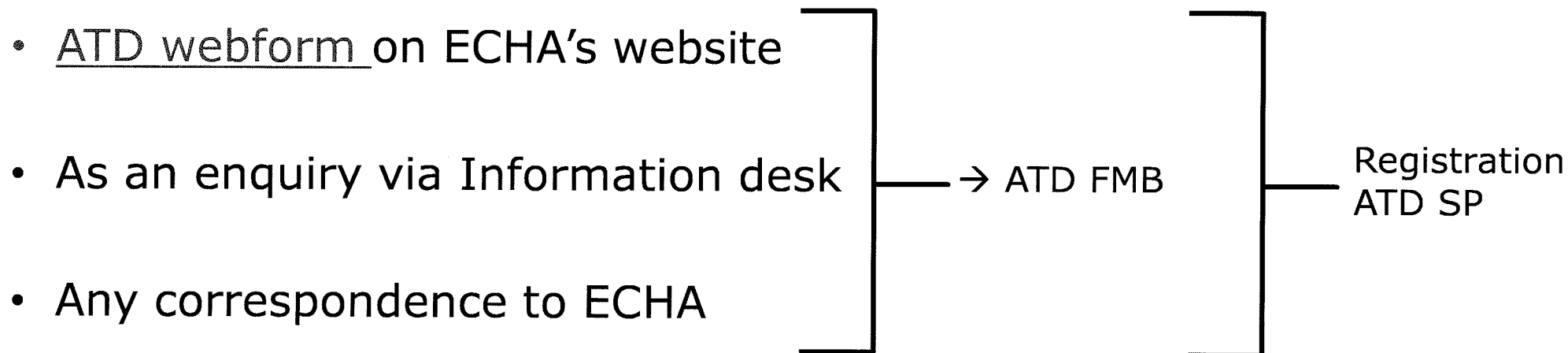
= limited to the recipient

All formal communications and evidence gathered during the decision-making process





How requests are submitted?

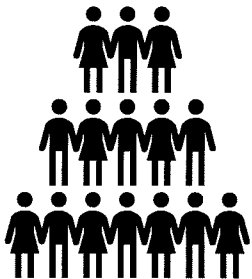


Is it or is it not an ATD? Consult LAU 😊

Exceptions to disclosure



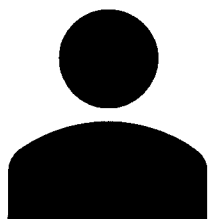
Protection of public interest:



- Information relating to **public security, defence...**

→ *Rarely used in our work (if not at all)*

Protection of privacy & integrity of individuals: (1/2)

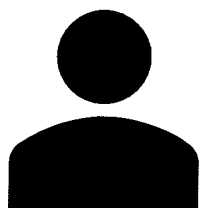


Any **information relating to an identified or identifiable individual** (Regulation 2018/1725 on the protection of personal data)

→ *Strongest exception*

Protection of **privacy & integrity of individuals**: (2/2)

Examples of personal data



- **names, signatures, contact details**
- Observations/opinions which can be attributed to identifiable persons

→ *BLANKING*: Mr. 



NO BLANKING

Transfer of personal data only if the following conditions are met:

- ✓ Requestor established that data transfer is **necessary for a specific purpose** in the public interest
- ✓ **No reason** to assume that the data subject's legitimate **interests will be prejudiced**

Protection of commercial interests...

Examples of commercial interests:

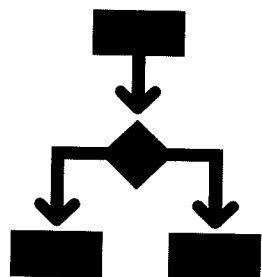
- Substance identity/composition
- Links in the supply chain
- Specific Uses



Not subject to protection:

- General reference to the commercial value of the information

Protection of the decision-making process...



Cumulative conditions:

- Process must be **on-going**
- Disclosure would cause **serious harm** to the process

Protection of Court proceedings, legal advice, inspections, investigations and audits ...



- Pleadings, documents lodged to the Court
- Advice related to a legal issue
- Forum documents

...unless there is an overriding public interest in disclosure

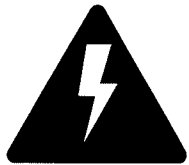
Examples:

- Aarhus Regulation - Information relating to emissions into the environment (studies on glyphosate)
- Up to the applicant to demonstrate

KEY POINTS - exceptions



Restrictive interpretation of the exceptions

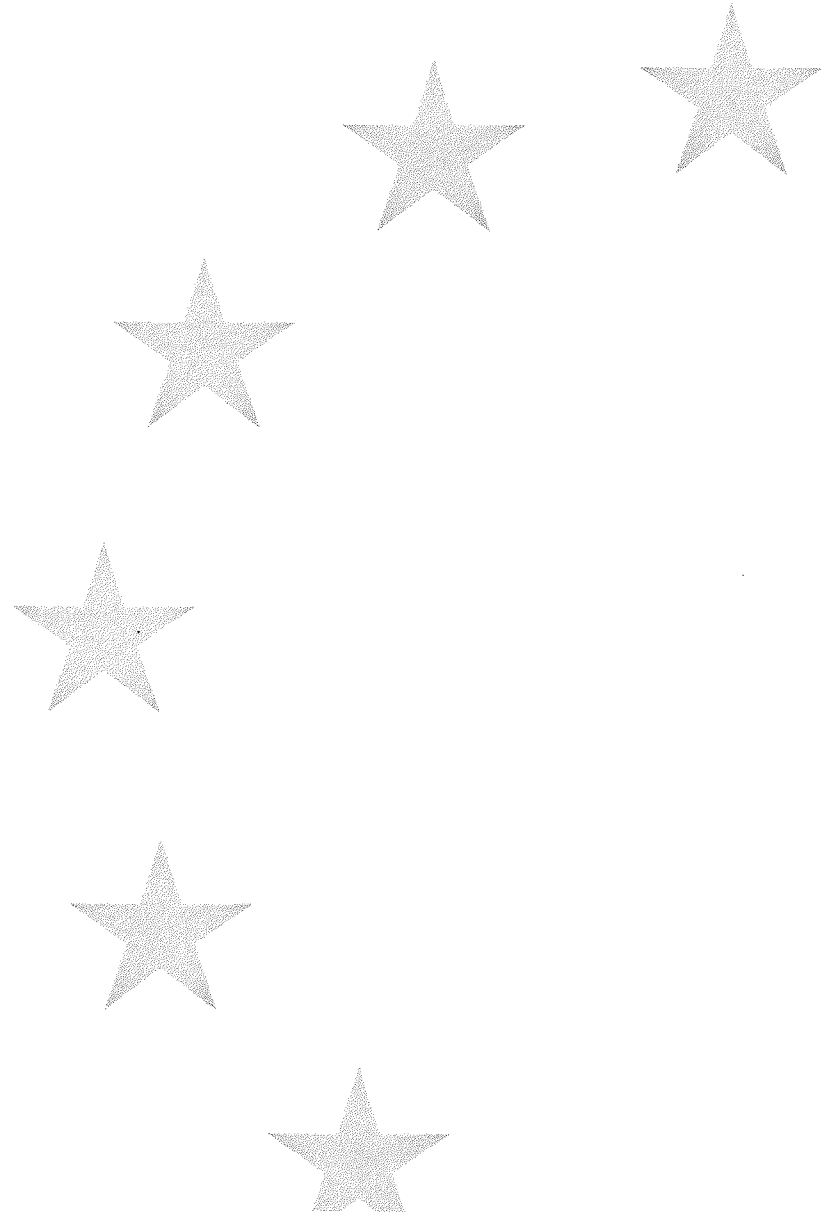


Risk must be **reasonably foreseeable** and **not purely hypothetical**



Disclosure is **likely, specifically and actually** to **undermine protection** of the particular interest

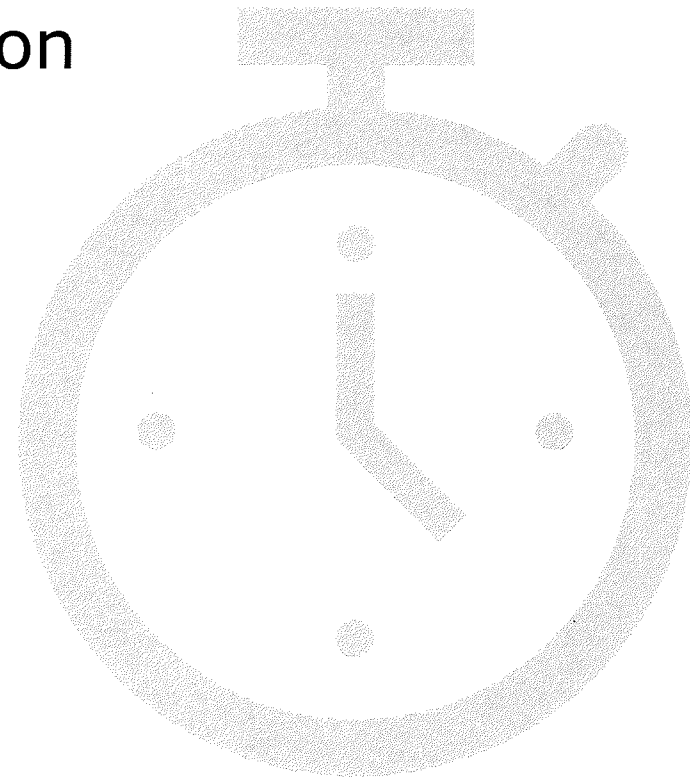
ATD Processing



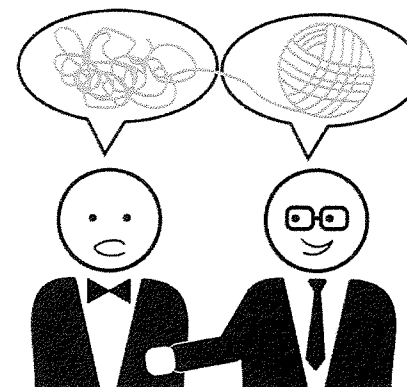
Deadline to reply to request

15 working days –
starting from day of registration

→ justified extension possible
(+ 15 working days)

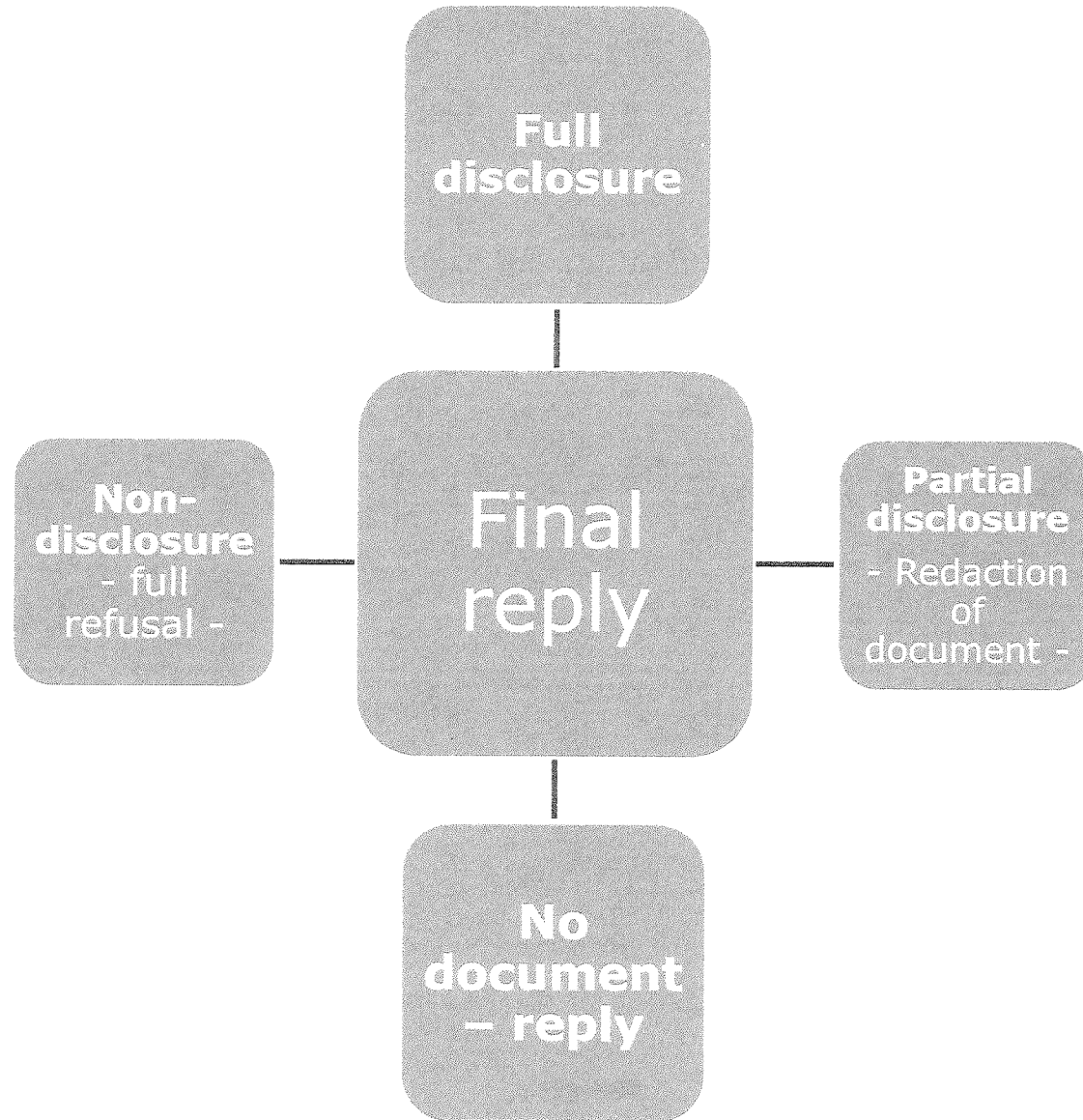


Clarification requests

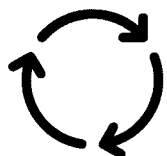


- Application is **not sufficiently precise**
- Documents **already publicly available** might satisfy the request
- **Interruption** of the statutory **deadline** to reply to the request
- If **no reply**, the request is **closed**

Outcome of the initial application



What is a confirmatory application?



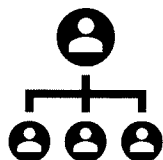
Application requesting ECHA to review its position (initial decision)



Initial application was fully or partially refused, or no reply was received within the deadline

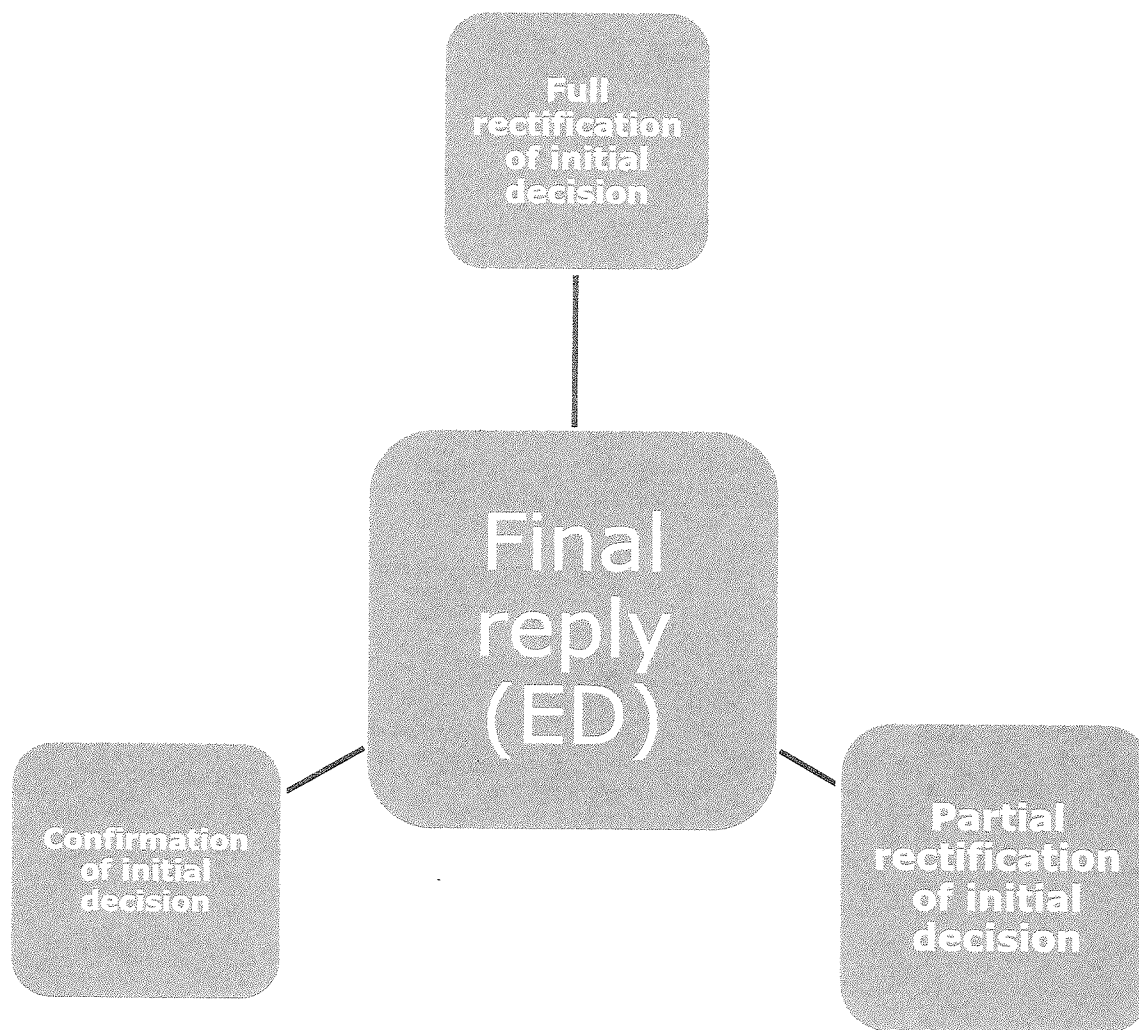


Deadline to submit confirmatory application: 15 working days

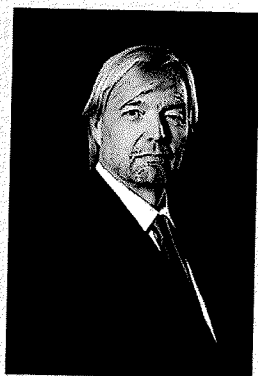


Executive director takes the decision

Outcome of the confirmatory application



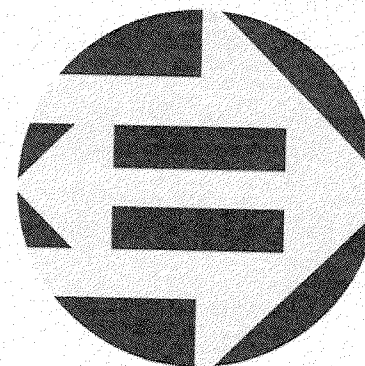
Confirmatory application, means of legal redress and complaint to the EU Ombudsman



Applicant wants ECHA to reconsider its position = **confirmatory application**



Confirmatory decision can be **contested before the EU Courts**



Complaint **to the EU Ombudsman** concerning the confirmatory decision

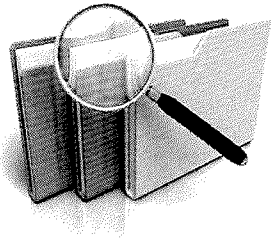
Third Party Consultation





When is third party consultation needed?

When document originates from:



Member State



Mandatory consultation

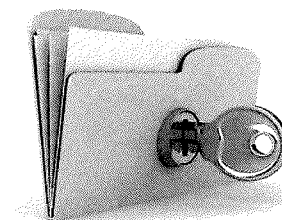
Other third party



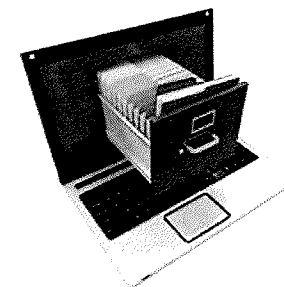
Potential consultation

Third party's objection

- ECHA agrees → **redactions applied**



- ECHA does not agree → **Third party is informed of the intention to disclose**



Ten days letter



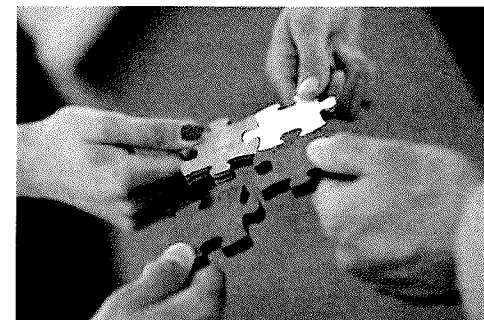
- **If no reaction** within 10 working days → **document disclosed**
- **If reaction:** The third party indicates that they have initiated or will go to court → **disclosure is delayed until the Court's ruling**

**ECHA consulted
as a third party**

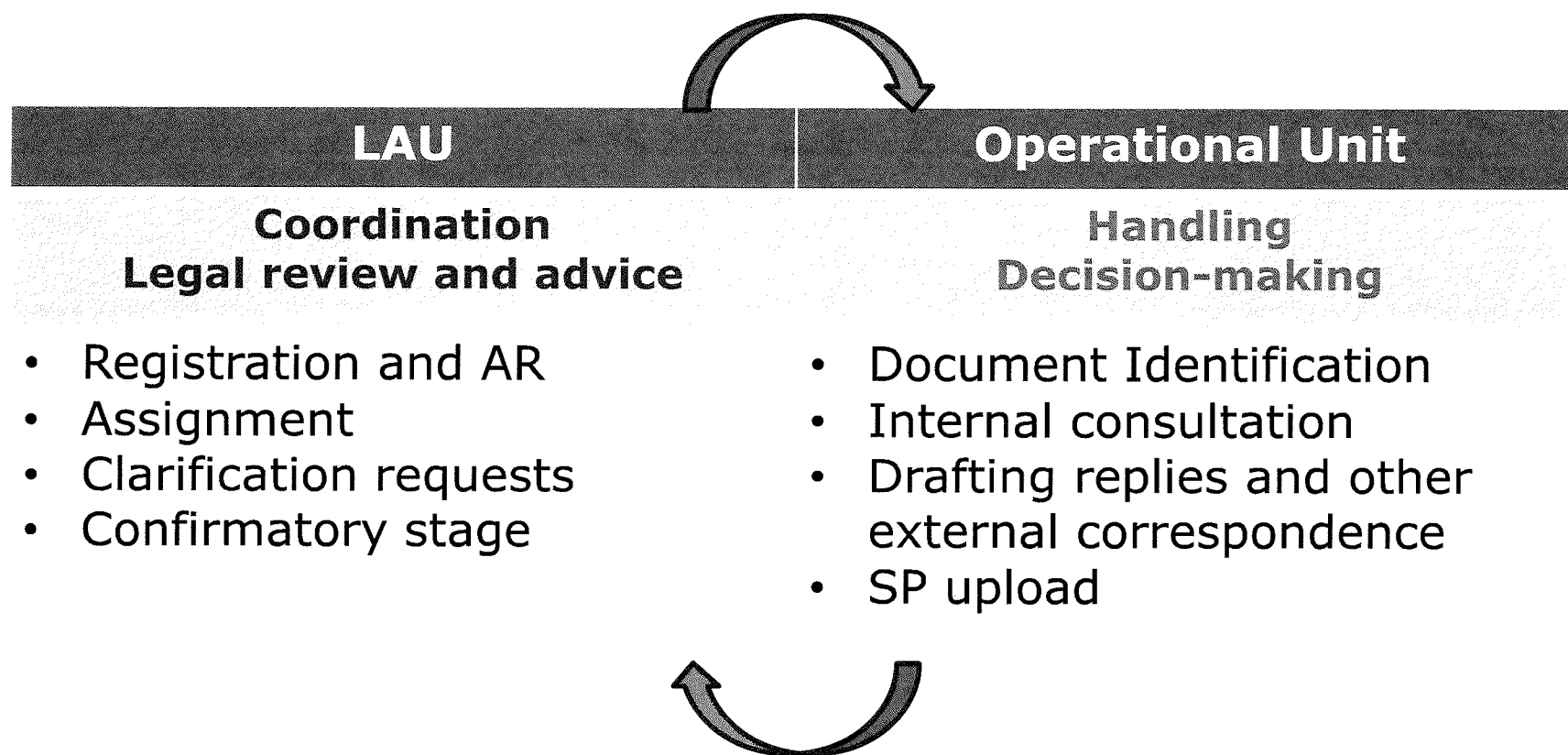


Processing of third-party consultations addressed to ECHA

- ECHA can be consulted by **Member States and EU institutions on the disclosure of a document originating from ECHA**
- If information originates from e.g. company or MSCA **further consultation may be needed**



Who does what?



→ See [WIN - 011](#)

Useful links

[ATD Regulation](#)

[Information on ECHA's website](#)

[Information on ECHAnet](#)

[WIN-0011.11](#)

[WIN-0130.07](#)

[ATD SP instructions](#)

[MB Decision MB/12/2008](#)



Practical scenarios



1. Requests for access to documents with a specific format

The applicant seeks access to a document containing all the information in ECHA's database(s) in a machine-readable format, however ECHA does not hold such document and extracting the requested information from the database requires a manual compilation.

What is the line to take?

- A. ECHA creates an excel file containing the information requested by the applicant
- B. ECHA issues a 'no-document' reply

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2. Requests for access to documents which are not clearly formulated

It is not possible to clearly identify the requested document(s) since the wording used by the applicant is too general.

Furthermore, ECHA is in possession of a document which could only partially meet the applicant's request.

What is the line to take?

- A. ECHA requests the applicant to clarify the scope of the request, referring to the document in ECHA's possession that could meet the applicant's request
- B. ECHA issues a 'no-document' reply
- C. ECHA provides access to the document in its possession

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3. Total refusal v. partial access

The requested document contains confidential business information as well as personal data.

What is the line to take?

- A. ECHA decides to refuse access to the requested document.
- B. Following an individual assessment of the requested document, ECHA examines the possibility to grant partial access to the requested document by blanking sensitive information and personal data
- C. ECHA comes back to the requestor asking the reasons why he/she seeks access to that document

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4. Request for access to meetings' video recording

The applicant requests access to the video recording of a Committee's meeting, however ECHA previously assured the meeting's participants that the recording is carried out only for the purpose of the preparation of the meeting's minutes.

What is the line to take?

- A. ECHA cannot disclose the video recording because it gave assurance that the video recording was created for internal purposes only
- B. ECHA assesses whether an exception to disclosure of the video recording applies under the ATD Regulation
- C. ECHA cannot process the request under the ATD Regulation because the video recording cannot be considered as a document

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5. Third party consultation with Member States

ECHA consulted the MSCA author of the requested document, which did not raise any objections to its disclosure.

What is the line to take?

- A. ECHA grants full access to the requested document since the MSCA did not oppose to its disclosure
- B. ECHA performs a *prima facie* check of the requested document to assess whether any of the exceptions under the ATD Regulation is applicable and, if needed, redacts parts of the requested document informing the MSCA
- C. ECHA asks the MSCA to redact part(s) the document if it considers that one or more exceptions under the ATD Regulation are applicable

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6. ECHA consulted as a third party

ECHA is consulted by a MSCA on the disclosure of a document which contains information provided by ECHA. However the author of the document is the MSCA.

What is the line to take?

- A. ECHA replies to the MSCA that there is no need to consult the Agency since the MSCA is the author of the document
- B. ECHA assesses whether the information in question could be covered by an exception under the ATD Regulation and communicate its assessment to the MSCA

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7. Document containing personal data

The applicant seeks access to a document containing the comments of several experts consulted by ECHA. He/she claims that ECHA should grant full access to the requested document since the identity of the experts is already publicly known and, in any case, the experts were providing their comments in their professional capacity.

What is the line to take?

- A. ECHA grants full access to the requested document asking however the applicant to not disclose it to any third parties
- B. ECHA assesses whether the applicant has established the necessity of the personal data transfer and, if so, it examines the possible prejudice to the individuals' legitimate rights
- C. ECHA asks the concerned experts if they object the disclosure of their personal data, if not, it grants full access to the requested document

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8. Document containing commercially sensitive information

The third party consulted by ECHA claims that a certain information should be redacted from the document referring in general to its commercial interests. However, no further explanation is provided.

What is the line to take?

- A. ECHA decides to accept the redaction proposed by the third party
- B. ECHA decides to grant full access to the requested document since the third party did not substantiate how its disclosure would harm the third party's commercial interests and communicates its decision to the third party before disclosing the document.

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9. Draft documents

The applicant request access to the minutes of the meeting of the xx Committee, however these are not yet finalized and/or approved.

What is the line to take?

- A. ECHA refuses access on the basis of the decision-making process exception: indeed, the minutes are still a draft and their disclosure would risk to expose the participants to the meeting to external pressure
- B. ECHA performs an individual assessment of the requested document to concretely verify whether any of the exception under the ATD Regulation could be applicable and, on this basis, decides to partially disclose the document

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10. The effect of a request for clarification to the applicant

Following ECHA's request the applicant clarifies the scope of the request.

What is the line to take?

- A. ECHA can now register the request as an ATD request
- B. ECHA will assess the request but the deadline for the reply will only run from the date of receipt of the clarification
- C. ECHA shall in any case reply within 15 working days from the registration of the request, sending an extension of the deadline if needed

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Thank you!

For any questions feel free to ask
us via the ECHA ATD FMB:

[access-to-
documents@echa.europa.eu](mailto:access-to-documents@echa.europa.eu)